

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARPU VENUGOPAL,  
  
Plaintiff,  
  
v.  
  
CITIBANK, NA,  
  
Defendant.

No. C 12-2452 CW

ORDER GRANTING  
MOTION FOR LEAVE  
TO FILE AMENDED  
COMPLAINT (Docket  
No. 21); DENYING  
MOTION TO DISMISS  
(Docket No. 6).

Plaintiff Marpu Venugopal moves to file a First Amended Complaint (1AC). Defendant Citibank, NA opposes the motion. The Court took the matter under submission on the papers and now grants the motion.

BACKGROUND

On April 12, 2012, Plaintiff filed a complaint against Defendant in state court for allegedly providing inaccurate information about his finances to various credit reporting agencies. Docket No. 1, Compl. ¶¶ 11-27. Specifically, he claims that Defendant reported an outstanding debt of \$197,466 even though it was aware that this debt had been discharged in a June 2009 bankruptcy proceeding. Id.

Plaintiff asserts claims under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681s-2(b); the Consumer Credit Reporting Agencies Act (CCRAA), Cal. Civ. Code § 1785.25; the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 et seq.; and the Song-Beverly Credit Card Act, Cal. Civ. Code §§ 1747 et seq. Compl. ¶¶ 28-65. His complaint also asserts various state tort claims against Defendant. Id. ¶¶ 66-92. Defendant removed

1 the case to federal court on May 14, 2012 and moved to dismiss one  
2 week later. Docket No. 6. Its motion to dismiss is still  
3 pending.

4 On November 16, 2012, Plaintiff filed this motion for leave  
5 to amend his complaint. Docket No. 21. His proposed First  
6 Amended Complaint (1AC) would dismiss six of the nine claims in  
7 his original complaint, preserving only his FCRA, CCRAA, and UCL  
8 claims. In addition, the proposed 1AC would amend some of the  
9 factual allegations in his original complaint and add additional  
10 allegations about when he first learned of Defendant's alleged  
11 reporting inaccuracies.

#### 12 LEGAL STANDARD

13 Federal Rule of Civil Procedure 15(a) provides that leave of  
14 the court allowing a party to amend its pleading "shall be freely  
15 given when justice so requires." Because "Rule 15 favors a  
16 liberal policy towards amendment, the nonmoving party bears the  
17 burden of demonstrating why leave to amend should not be granted."  
18 Genentech, Inc. v. Abbott Laboratories, 127 F.R.D. 529, 530-531  
19 (N.D. Cal. 1989).

20 Courts consider five factors when assessing the propriety of  
21 a motion for leave to amend: undue delay, bad faith, futility of  
22 amendment, prejudice to the opposing party and whether the  
23 plaintiff has previously amended the complaint. Ahlmeier v. Nev.  
24 Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir. 2009).  
25 However, these factors are not of equal weight; specifically,  
26 "delay alone no matter how lengthy is an insufficient ground for  
27 denial of leave to amend." United States v. Webb, 655 F.2d 977,  
28 980 (9th Cir. 1981). Futility of amendment, by contrast, can

1 alone justify the denial of a motion for leave to amend. Bonin v.  
2 Calderon, 59 F.3d 815, 845 (9th Cir. 1995); Miller v. Rykoff-  
3 Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

4 DISCUSSION

5 Defendant contends that allowing Plaintiff to amend his  
6 complaint while its motion to dismiss is still pending would be  
7 unduly prejudicial. It also asserts that Plaintiff's proposed  
8 amendments are futile because they contradict allegations in his  
9 original complaint. Each of these arguments is addressed in turn.

10 I. Undue Prejudice

11 Defendant contends that, if Plaintiff is permitted to file an  
12 amended complaint, it would be forced "to reiterate [its] reasons  
13 for a dismissal a second time" before it has received a ruling on  
14 its first motion to dismiss. Opp. 2. This concern is  
15 insufficient to establish undue prejudice.

16 Even assuming that Defendant would face some hardship in  
17 reprising its previous arguments for dismissal, Defendant ignores  
18 the fact that Plaintiff's proposed 1AC dispenses with most of his  
19 original claims. This substantially reduces whatever burdens  
20 Defendant would face in moving to dismiss Plaintiff's amended  
21 complaint.

22 Furthermore, even if the Court were to deny Plaintiff's  
23 current request for leave to amend, it could still grant Plaintiff  
24 leave to amend later when it ruled on Defendant's motion to  
25 dismiss. This is why courts are typically reluctant to deny a  
26 plaintiff leave to amend simply because motion to dismiss is  
27 pending. See e.g., In re AMBAC Fin. Group, Inc. Derivative  
28 Litig., 2008 WL 5262428, at \*1 (S.D.N.Y.) (granting plaintiff

1 leave to amend after concluding that "prejudice is not at  
2 issue -- even if the pending motion to dismiss were granted, the  
3 Court would still be within its discretion to grant leave to amend  
4 if the pleading defects could be cured in an amendment"); see also  
5 Nejo v. Wilshire Credit Corp., 2010 WL 2888905, at \*2 (E.D. Cal.)  
6 (granting leave to amend complaint despite a pending motion to  
7 dismiss because amendment would only cause "garden variety delay  
8 already contemplated by Rule 15(a)'s liberal amendment policy").

9 In sum, because Plaintiff seeks leave to amend early in the  
10 litigation, has not previously amended his complaint, and has  
11 proposed to dismiss the majority of his original claims, leave to  
12 amend would not unduly prejudice Defendant here.

### 13 II. Futility

14 Defendant next contends that Plaintiff's proposed amendments  
15 are futile because they contradict factual allegations in his  
16 original complaint. In particular, Defendant highlights the  
17 amendment that Plaintiff proposes regarding his May 17, 2011  
18 credit report. Defendant notes that while Plaintiff's original  
19 complaint alleged that the May 17 report showed that Defendant  
20 failed to report properly his 2009 bankruptcy discharge, see  
21 Compl. ¶ 17, his proposed 1AC seems to allege the opposite, see  
22 1AC ¶ 17.<sup>1</sup>

---

23 <sup>1</sup> Plaintiff seems to have made this change in response to a point  
24 that Defendant raised in its motion to dismiss. Specifically, Defendant  
25 noted that the May 17, 2011 credit report -- which Plaintiff attached as  
26 an exhibit to his original complaint -- contained language indicating  
27 that Defendant had, in fact, properly reported Plaintiff's bankruptcy  
28 discharge to credit reporting agencies. To cure this defect,  
Plaintiff's proposed 1AC alleges that he obtained two "updated" credit  
reports, neither of which is mentioned in his original complaint, on May  
25, 2011 and March 12, 2012 that document Defendant's failure to report  
the bankruptcy discharge. 1AC ¶¶ 18-19.

1 The Ninth Circuit has cautioned that leave to amend should  
2 not necessarily be denied merely because the amended complaint  
3 contains allegations that contradict those in the original  
4 complaint. In PAE Government Services, Inc. v. MPRI, Inc., the  
5 court held that "[u]nless there is a showing that the party acted  
6 in bad faith . . . inconsistent allegations are simply not a basis  
7 for striking the pleading." 514 F.3d 856, 860 (9th Cir. 2007)  
8 ("Does the fact that an amended complaint [] contains an  
9 allegation that is apparently contrary to an earlier iteration of  
10 the same pleading render the later pleading a sham? The answer  
11 is: not necessarily.").

12 Here, Plaintiff's proposed 1AC serves mainly to add new  
13 factual allegations about credit reports that he failed to  
14 identify in his original complaint. 1AC ¶¶ 18-19. It also omits  
15 an allegation mistakenly included in the original complaint  
16 concerning the contents of his May 17, 2011 credit report. Id.  
17 Because neither of these proposed changes evinces bad faith on the  
18 part of Plaintiff, leave to amend is granted.

#### 19 CONCLUSION

20 For the reasons set forth above, the Court GRANTS Plaintiff's  
21 motion for leave to file a first amended complaint (Docket No. 21)  
22 and DENIES Defendant's motion to dismiss (Docket No. 6) as moot.

23 Plaintiff shall file and serve its 1AC within two days of the  
24 filing of this order. Because his earlier pleading included an  
25 exhibit showing that the subject debt had been properly reported  
26 as of May 17, 2011, Plaintiff is directed to attach copies of the  
27 "updated" credit reports to which his amended complaint refers,  
28 1AC ¶¶ 18-19, as exhibits to the 1AC.

1 Defendant shall file a responsive pleading or a motion to  
2 dismiss within twenty-one days of being served with Plaintiff's  
3 1AC. The Court will hear Defendant's motion to dismiss, if it  
4 files one, at 2:00 p.m. on March 21, 2013. A case management  
5 conference will also be held on that date, regardless of whether  
6 or not Defendant files a motion to dismiss.

7 IT IS SO ORDERED.

8  
9 Dated: 1/16/2013

  
CLAUDIA WILKEN  
United States District Judge